

ENTERED

January 08, 2019

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EDDIE WARREN MARLOW,

Plaintiff,

v.

GILBERT RODRIGUEZ,

Defendant.

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Civil Action No. H-18-4857

MEMORANDUM OPINION AND ORDER

Eddie Warren Marlow, a pretrial detainee awaiting trial on two charges of assault of a family member with a prior conviction, files this *pro se* section 1983 complaint against his appointed defense counsel. He seeks \$1 million in damages for the allegedly inadequate representation defendant provided during plaintiff's criminal proceedings. The Court **DISMISSES** this lawsuit for the reasons that follow.

Plaintiff alleges that his defense counsel viewed an exculpatory videotape of the crime scene and never "pushed for dismissal" of the charges. Section 1983 grants the right of redress only to one whose constitutional rights are violated by a person acting under color of state law. 42 U.S.C. § 1983. A person acts under color of state law only when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Thibodeaux v. Bordelon*, 740 F.2d 329, 333 (5th Cir. 1984).

It is well established that defense counsel, whether appointed or retained, are not state actors for purposes of section 1983. Of import here, “a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.” *Polk County v. Dodson*, 454 U.S. 312, 325 (1981); *Amir-Sharif v. Dallas County Public Defenders Office*, 233 F. App’x 364, 365 (5th Cir. 2007).

Plaintiff’s instant claims challenge actions taken and decisions made by counsel in the performance of his traditional functions as counsel to a person charged with a crime. Therefore, defendant is not a state actor for purposes of this lawsuit. Plaintiff’s claims are based on an indisputably meritless legal theory and must be dismissed.

This lawsuit is **DISMISSED WITH PREJUDICE** as frivolous and for failure to state a viable claim. Any and all pending motions are **DENIED AS MOOT**. This dismissal constitutes a “strike” for purposes of section 1915(g).

The Clerk is to provide a copy of this order to plaintiff and to the Clerk of the United States District Court for the Southern District of Texas, Houston Division, 515 Rusk Street, Houston, Texas, 77002, Attention: Three-Strikes List Manager, at the following email: Three_Strikes@txs.uscourts.gov.

SIGNED at Houston, Texas, on this the 8th day of January, 2019.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE